Filed 4/17/19 Turner v. Getzels CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DOUGLAS TURNER, Plaintiff and Appellant, v. MORRIS S. GETZELS, et al., Defendants and Respondents.	B289264 (Los Angeles County Super. Ct. No. BC626530)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Howard L. Halm, Judge. Reversed and remanded with directions.

Douglas G. Turner, in pro. per., for Plaintiff and Appellant.

Yee & Associates, Steven R. Yee and Eric O. Zeiger, for Defendant and Respondent.

Nicolas Supancic, in pro. per., Defendant and Respondent.

I. INTRODUCTION

Douglas Turner sued an attorney and his client (defendants)[1] for malicious prosecution based on an underlying discrimination action filed by the attorney against Turner and two other individuals. Following a bifurcated bench trial on the legal issue of probable cause, the trial court entered a judgment in favor of defendants, ruling that Turner had not shown defendants lacked probable cause to initiate and maintain the underlying action.

On appeal, Turner contends that the trial court erred when it: misapplied California's objective rule of probable cause regarding the Americans with Disabilities Act (ADA)[2] and related state law claims; concluded there was probable cause to assert the intentional tort claims against Turner; and concluded that the intentional tort claims were not terminated in Turner's favor.

We hold that, under the legal theories pleaded, defendants did not have probable cause to assert against Turner the ADA and related state law discrimination claims, the intentional tort claims, and the sexual orientation discrimination claims. In addition, although the trial court discussed the favorable termination element in its statement of decision, it did not base its decision or judgment on that element and, in any event, the merits of the favorable termination element were not properly before the trial court during the bifurcated trial on the probable cause element. We therefore reverse the judgment.

---

[1] Defendants are attorney Morris Getzels (Getzels) and his client, Nicolas Supancic (Supancic).

[2] Title 42 United States Code section 12181 et seq.

II. FACTUAL[3] AND PROCEDURAL BACKGROUND

A. *Underlying Action*

1. Original Complaint

a. Partnership/Agency Theory

On or about October 30, 2012, Getzels, on behalf of Supancic, filed the original verified complaint. He named as defendants three individuals: Pierre Moeini (Moeini), his wife Golriz Moeini, and Turner. The complaint alleged in paragraph 2 that "those three individual defendants [did] business as [t]he White Harte Public House [(the White Harte Pub)]" and "the Moeinis and . . . Turner [were] partners and or agents of one another, and . . . the acts of each with regard to the White Harte [Pub], [were] done on behalf of the others, and . . . [the] acts done by one concerning the White Harte [Pub were] done on behalf of the others. [T]he three [individual defendants] own[ed] and operat[ed] the White Harte [Pub], as general partners."

b. The Incident

Supancic alleged the following about the incident that gave rise to his lawsuit against Turner. On March 13, 2012, around 9:15 p.m., Supancic entered the White Harte Pub with a friend and Supancic's dog, which was wearing a vest identifying it as a

---

[3] The factual background is based on the 18 stipulated facts and the 17 exhibits considered by the trial court in making its probable cause determination.

service dog,[4] "to purchase food to be consumed on the premises." Moeini approached Supancic and told him that he must pick up the dog or leave. Supancic explained to Moeini that his dog was a service dog and that Moeini was infringing upon Supancic's rights. Moeini then "physically forced" Supancic out of the White Harte Pub along with Supancic's friend and dog.

Outside the White Harte Pub, Supancic advised Moeini that he was violating the law. In response, Moeini told Supancic that he did not "'give a f[u]ck'" and directed him to "'leave or get [his] ass kicked.'" When Supancic informed Moeini that he had committed an additional wrongful act by threatening Supancic with bodily harm, Moeini said, "'I don't give a sh[i]t. How about this. I'm not letting you in because you look like a little faggot, you and your friend look like faggots, and you have a little faggot dog.'" Supancic again advised Moeini that those statements were wrongful acts, but Moeini just laughed and told Supancic that he owned "'six of these places'" and that he did not allow homosexuals into any of them.

When Moeini became aware that his comments were being overheard on the friend's cell phone, he told Supancic that he would "smash [his] head into a million pieces if [he did] not get the f[u]ck off [Moeini's] property right now.'" Concerned that Moeini "seemed to be on the verge of inflicting great physical harm," Supancic and his friend left the location quickly.

---

[4] According to Supancic, he had "a service dog to help [him] cope . . . with his disability[,] and to allow him to participate in major life activities."

c. Causes of Action

Based on the foregoing factual allegations, Supancic asserted ten causes of action against all three individual defendants, including Turner. The claims against Turner were based solely on a vicarious liability theory as either the partner or principal of Moeini. Those claims fell into three categories based on disability/service dog discrimination, common law intentional torts, and sexual orientation discrimination.[5]

---

[5] Specifically, Supancic asserted claims for: (1) violation of the Unruh Civil Rights Act based on alleged discrimination against Supancic "because of [his] disability, and his need to be accompanied by his service dog"; (2) violation of the California Disabled Persons Act based on the alleged deprivation of Supancic's right to full and equal access to places to which the general public was invited, and his right to be accompanied by his service dog in entering such places; (3) temporary restraining order (TRO) and temporary and permanent injunctions based on the defendants' alleged conduct in denying Supancic and all persons with disabilities who have service dogs full and equal access to the accommodations and services of the White Harte Pub; (4) violation of the ADA based on the alleged "illegal discriminatory act [of] having . . . Supancic ejected from the White Harte [Pub] because he was accompanied by his service dog"; (5) intentional infliction of emotional distress based on the defendants' alleged knowledge that Supancic had a service dog, was therefore disabled, and would suffer emotional distress from being ejected from the White Harte Pub; (6) assault and battery based on the defendants' alleged intent "to cause or to place []Supancic in apprehension of a harmful or offensive contact with [Supancic's] person"; (7) violation of the Unruh Civil Rights Act based on the alleged denial of full and equal access to the accommodations and services of the White Harte Pub based on

2. Doe Amendment

On November 15, 2012, approximately two weeks after he filed his original complaint, Supancic filed an amendment to the complaint, substituting Harte LLC as a defendant for fictitiously named "Doe 1." According to the amendment, Supancic had "discovered the true name" of that Doe defendant to be Harte LLC. The White Harte Pub was the business name of Harte LLC which operated the business since 2007. Harte LLC was registered with the California Secretary of State on May 11, 2007, and Harte LLC was registered and licensed by the Department of Alcoholic Beverage Control on October 11, 2007.

3. Dismissal of all Defendants Except Turner

On May 31, 2013, Supancic dismissed Golriz Moeini from the underlying action. On May 13, 2014, Supancic settled with and dismissed Harte LLC and Moeini, leaving Turner as the sole remaining defendant.

Supancic's "perceived sexua[l] orientation"; (8) TRO and temporary and permanent injunctions based on the alleged denial of access to the White Harte Pub to "all persons with a homosexual orientation or whom [the d]efendants perceive[d] to have a homosexual orientation"; (9) violation of the Tom Bane Civil Rights Act based on Moeini's alleged refusal to allow Supancic to enter the White Harte Pub because Supancic had a service dog and because Supancic was perceived by Moeini as a homosexual; and (10) violation of the ADA based on Moeini's alleged interference, on behalf of himself and the other defendants, with Supancic's attempts to exercise his right to have a service dog.

4. Supancic's Ex Parte Request to Amend

On March 26, 2014, Supancic applied ex parte for leave to amend his complaint. He proposed to amend his original complaint by deleting the language in paragraph 2 describing the Moeinis and Turner as the owners and general partners of the White Harte Pub and replacing it with the following two sentences: "The White Harte [Pub] is a [place of] public accommodation. The real property on which the White Harte [Pub], the discriminating public accommodation[,] is located is owned by . . . Turner . . . and . . . Moeini, . . . who lease the real property to . . . Harte[] LLC."[6] The trial court denied the ex parte application.

5. Turner's First Summary Judgment Motion

On or about September 12, 2014, Turner filed a motion for summary judgment based on the original complaint. Turner argued that because he was not Moeini's general partner or principal, but merely a member of Harte LLC, he could not be personally liable for Moeini's misconduct. That motion was

---

[6] On March 28, 2014, Supancic also filed an opposition to Turner's motion for judgment on the pleadings in which he argued, among other things, that Turner was liable for discrimination under 28 Code of Federal Regulations part 36.201 as owner of the real property. The rulings on Supancic's ex parte request for leave to amend and Turner's motion for judgment on the pleadings are not in the record, but it appears undisputed that the original complaint was not amended and none of its claims were dismissed in response to the filing of those papers.

scheduled for hearing on December 5, 2014, but was taken off calendar before that date.

6. Supancic's Motion for Leave to Amend And First Amended Complaint

On October 24, 2014, Supancic filed a motion for leave to amend his complaint. In the motion, Supancic renewed his earlier request to add allegations that Turner was an owner and lessor of the real property on which the White Harte Pub was located[7] and therefore liable for the ADA and related violations asserted in the complaint.

On November 26, 2014, Supancic filed with leave of court his first amended complaint. The amended pleading was identical to the original complaint, except that the language of paragraph 2 describing Turner and the Moeinis as general partners in the ownership and operation of the White Harte Pub was deleted and replaced with the following two sentences: "The White Harte [Pub] is a place of public accommodation. The real property on which the White Harte [Pub], the discriminating public accommodation is located, was co-owned by . . . Turner and . . . Moeini at the time of the discrimination and at all material times, and . . . Turner and . . . Moeini, as landlords, leased the real property to . . . Harte[] LLC, as the tenant, (whose members were at that time . . . Turner and . . . Moeini) which LLC operated the White Harte [Pub] at the time of the discrimination . . . ." But the language in paragraph 2 describing Turner and the

---

[7] The parties stipulated for purposes of Phase I of the trial that Moeini and Turner were owners and landlords of the real property that Harte LLC leased for its White Harte Pub business.

Moeinis as agents of one another[8] remained in the first amended complaint, along with the language of the original 10 causes of action.

7. Turner's Second Summary Judgment Motion Re Owner/Lessor Liability

Following the filing of the first amended complaint, Turner filed a second motion for summary judgment. On February 18, 2015, Supancic filed his opposition to Turner's second motion for summary judgment. Supancic argued that Turner was liable for Moeini's actions against him and his service dog as a matter of law under the ADA and related state law claims because Turner was the owner and landlord of the real property on which the White Harte Pub was located.

On March 9, 2015, the trial court issued a minute order granting Turner's summary judgment motion. The trial court concluded that "[t]here are no facts presented that . . . Harte LLC had any policies that would support or enforce any type of discrimination action. All evidence relates to Moeini only. [¶] The court queries a question of law–can a member of an LLC be liable for the LLC's purported action[?] That answer is 'no.' [¶] No member of a limited liability company shall be personally liable for any liability of the limited liability company solely by

---

[8] The first amended complaint alleged that "Defendants . . . Moeini and . . . Turner are agents of one another, and . . . the acts of each with regard to the White Harte [Pub], are done on behalf of the others, and . . . each is the agent of the others, and . . . all acts done by one concerning the White Harte [Pub] are done on behalf of the others."

reason of being a member of that limited liability company. [Former] Corporations Code [section] 17101, [subdivision] (a)."

On June 11, 2015, the trial court entered judgment in favor of Turner.

8. Supancic's Appeal

On May 5, 2015, Supancic filed a notice of appeal from the orders granting summary judgment and denying Supancic's motion to reconsider. Supancic asserted only one challenge to the judgment based on his contention that "there were triable issues of fact on his theory of owner/lessor liability under the ADA." (*Supancic v. Turner* (Jun. 7, 2016, B263896) [nonpub. opn. at p. 2].) He did not challenge the judgment on his non-ADA based claims.

On June 7, 2016, this court affirmed the judgment in favor of Turner, holding that "the trial court did not err in granting summary judgment because, under the ADA and its implementing regulations, [Turner] did not have [a] direct liability to [Supancic] based solely on his status as the owner and lessor of the public accommodation in which the alleged disability discrimination occurred." (*Supancic v. Turner* (Jun. 7, 2016, B263896) [nonpub. opn. at p. 2.].) We observed that, "[t]he first amended complaint in fact alleged no specific act or omission by [Turner], relying instead on [Turner's] status as an owner of the real property at the time that Moeini acted to eject [Supancic] from the White Harte [Pub]." (*Id.* at p. 5.) Further, in affirming the trial court's judgment, we observed, "[Supancic] does not and cannot articulate a viable theory of vicarious liability, such as agency, against [Turner], who has an ownership interest in [a]

limited liability company that runs the White Harte [Pub]. Thus, in amending the complaint while the initial summary judgment motion was pending, [Supancic] limited his theory to liability based solely on [Turner's] status as an owner or lessor under the ADA. According to [Supancic's] theory, [Turner] had direct liability to him for the alleged ADA violation based solely on his status as owner/lessor of the real property upon which the violation occurred." (*Id.* at p. 11.)

B. *Turner's Malicious Prosecution Action*

On July 8, 2016, Turner filed his malicious prosecution action against Getzels and Supancic.[9] Turner alleged, among other things, that "[d]efendants acted without probable cause in bringing and/or maintaining the . . . action against [Turner] because as a matter of law no reasonable attorney would regard as tenable the prosecution of the claims against [Turner]." On November 17, 2017, the trial court denied Getzels's motion for summary judgment.

The parties thereafter stipulated that "the trial may be phased under Code of Civil Procedure section 597 so that the sole issue in Phase I would be whether [d]efendants had probable cause to initiate and/or maintain the underlying action . . . ." On December 27, 2017, the parties stipulated to 18 facts and the admission of 17 exhibits to be considered by the trial court in the Phase I determination on the issue of probable cause.

---

[9] Turner's verified complaint also asserted a cause of action for intentional infliction of emotional distress, but, according to Getzels, the trial court sustained without leave to amend Getzels's demurrer to that cause of action.

On January 31, 2018, the trial court began Phase I of the trial. The court indicated that it did not need any further evidence to rule on Phase I. Following the arguments of counsel, the trial court took the matter under submission.

On February 27, 2018, the trial court issued its "Statement of Decision: Trial, Phase [I]–Probable Cause." The trial court ruled that Turner had failed to establish lack of probable cause, reasoning as follows: "With regard to the First, Second, Third, Fourth, Fifth, Sixth, Ninth and Tenth Causes of action, the Court finds that Defendants had probable cause to pursue and maintain them based on [Turner's] status as an owner and landlord of the real property that Harte LLC leased for its White Harte [Pub] business. (Stipulated Fact No. 18.) This finding is based on 28 Code of Federal Regulations [part] 36.201 . . . . [¶] . . . [¶] Whether or not Defendants' theory of liability articulated in [the original] complaint filed on October 30, 2012, was solely based on agency, at the time the underlying incident took place, [Turner] was one of the owners and lessors of the real property on which the White Harte [Pub] was located and was, therefore, subject to liability under 28 Code of Federal Regulations [part] 36.201. Some reasonable lawyers would agree that Defendants had probable cause to continue to prosecute these claims against [Turner]. Some reasonable lawyers would believe that these claims were legally tenable. [¶] . . . [¶]

"With regard to the [fifth] (intentional infliction of emotional distress) and [sixth] (assault and battery) causes of action,[10] . . . [¶] . . . the Court finds that Defendants had

---

10 The trial court's statement of decision incorrectly labeled Supancic's intentional infliction of emotional distress claim as the seventh cause of action and his assault claim as the eighth cause

probable cause to pursue and maintain the [fifth] and [sixth] causes of action based on [Turner's] co-ownership of the real property and knowledge of . . . Moeini's assaultive and stress-creating behavior towards customers as explained in [Turner's] verified [c]ross-[c]omplaint against Moeini filed on February 20, 2013[11]: [¶] . . . [¶] When Supancic entered the White Harte [Pub] on March 1, 2013, a landowner such as [Turner], was subject to: Restatement of Torts 2d, [section] 344: [¶] 'A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to: [¶] (a) discover that such acts are being done or are likely to be done, or [¶] (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.' [¶] The Court finds that some reasonable attorneys could have pursued and maintained an action against [Turner] based on the stipulated facts and applicable law. Some reasonable lawyers would find Defendants' claims against [Turner] tenable based on [Turner's] knowledge of . . . Moeini's assaultive and stress-inducing propensities described in [Turner's] verified cross-complaint."

---

of action. We refer to those claims as they are designated in the amended complaint, i.e., as the fifth and sixth causes of action, respectively.

[11] The trial court was referring to Turner's cross-complaint in a different lawsuit between Turner and Moeini.

As to the fifth and sixth causes of action, the tort causes of action for intentional infliction of emotional distress and assault, because the trial court's ruling and the Court of Appeal decision in the underlying action made no mention of these causes of action, the trial court stated it could not "conclude that any decision on the merits was made." The trial court therefore ruled "that [Turner] failed to establish the lack of probable cause on Defendants' part to pursue and maintain the underlying action, there is no need for a trial on the other prongs of a malicious prosecution action, *i.e.*, favorable [t]ermination and malice. [¶] Accordingly, judgment shall be entered for [Getzels and Supancic] against [Turner]. [Turner] shall take nothing."

On March 26, 2018, the trial court entered a judgment that incorporated its statement of decision and provided, in pertinent part, as follows: "[Turner] has failed to establish the lack of probable cause on defendants' part in pursuing and maintaining the underlying action; and [¶] . . . [¶] [Turner] shall take nothing."

III. DISCUSSION

A. *Standard of Review*

The trial court's ruling on the issue of probable cause based on undisputed facts presents an issue of law that we review de novo. "[T]he issue of probable cause is one for the court, not a jury. (*Sheldon Appel Co. v. Albert & Oliker* [(1989)] 47 Cal.3d [863,] 874-877 [(*Sheldon Appel*)].) Thus, where there are no disputed questions of fact relevant to the probable cause issue, the matter may be determined by summary judgment (or on

appeal by de novo review). (*Id.* at pp. 884-886.)" (*Hufstedler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55, 63.

B. *Malicious Prosecution: Probable Cause*

"'The common law tort of malicious prosecution' . . . consists of three elements. The underlying action must have been: (i) initiated or maintained by, or at the direction of, the defendant, and pursued to a legal termination in favor of the malicious prosecution plaintiff; (ii) initiated or maintained without probable cause; and (iii) initiated or maintained with malice. ([*Sheldon Appel, supra,* 47 Cal.3d at p. 871]; see *Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 . . . (*Zamos*); *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 297 . . . .)" (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 776 (*Parrish*).)

"'[T]he probable cause element calls on the trial court to make an objective determination of the "reasonableness" of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable,' as opposed to whether the litigant subjectively believed the claim was tenable. ([*Sheldon Appel, supra,* 47 Cal.3d] at p. 878 . . .) A claim is unsupported by probable cause only if ""any reasonable attorney would agree [that it is] totally and completely without merit."" (*Wilson* [*v. Parker, Covert & Chidester* (2002)] 28 Cal.4th [811,] 817 [(*Wilson*)]; accord, *Sheldon Appel*[, *supra,* 47 Cal.3d] at p. 885 . . . ; *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 . . . [(*Flaherty*)]; see also *Zamos, supra*, 32 Cal.4th at p. 970 . . . .) 'This rather lenient standard for bringing a civil action reflects "the important public policy of avoiding the chilling of novel or

debatable legal claims.'" (*Wilson, supra*, [28 Cal.4th] at p. 817.) The standard safeguards the right of both attorneys and their clients ""to present issues that are arguably correct, even if it is extremely unlikely that they will win."" (*Ibid*., quoting *Flaherty, supra*, [31 Cal.3d] at p. 650 . . . .)" (*Parrish, supra,* 3 Cal.5th at p. 776.)

In *Sheldon Appel, supra*, 47 Cal.3d 863, the court explained that a claim is "legally tenable" if "any reasonable attorney would have thought the claim tenable." (*Id.* at p. 886.) A claim that is (i) legally sufficient, and (ii) substantiated by competent evidence, is considered legally tenable. (*Wilson, supra*, 28 Cal.4th at p. 821.) A claim is not required to be meritorious to be deemed legally tenable. "'Probable cause may be present even where a suit lacks merit. Favorable termination of the suit often establishes lack of merit, yet the plaintiff in a malicious prosecution action must *separately* show lack of probable cause. Reasonable lawyers can differ, some seeing as meritless suits which others believe have merit, and some seeing as totally and completely without merit suits which others see as only marginally meritless. Suits which *all* reasonable lawyers agree totally lack merit—that is, those which lack probable cause—are the least meritorious of all meritless suits. Only this subgroup of meritless suits present[s] no probable cause.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 743, fn. 13.)

"In analyzing the issue of probable cause in a malicious prosecution context, the trial court must consider both the factual circumstances established by the evidence and the legal theory upon which relief is sought. A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery

upon a legal theory which is untenable under the facts known to him." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164-165.) Notably, "unpled hidden theories of liability" are insufficient to support probable cause. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1542.)

Finally, two other principles relating to probable cause in the malicious prosecution context inform our analysis of the trial court's ruling in this case. First, even if an attorney has probable cause to assert a claim at the time an action is filed, that attorney may nevertheless be liable for malicious prosecution if he or she continues to prosecute the claim after discovering evidence that demonstrates it is no longer legally or factually tenable. (*Zamos*, *supra*, 32 Cal.4th at p. 958 ["an attorney may be held liable for malicious prosecution when he *commences* a lawsuit properly but then *continues* to prosecute it after learning it is not supported by probable cause"].) Second, if an underlying action asserted several grounds for liability, "an action for malicious prosecution will lie if any one of those grounds was asserted with malice and without probable cause." (*Kreeger v. Wanland* (2006) 141 Cal.App.4th 826, 832.)

C. *Analysis*

1. Partnership/Agency Theory

It is undisputed that for two years,[12] Supancic and Getzels pursued ten causes of action against Turner individually under a

---

[12] The Doe amendment to the original complaint adding Harte LLC as a named defendant was filed on

vicarious liability theory based on partnership and agency allegations. They persisted in pursuing that theory despite the fact that Turner's only interest in the White Harte Pub was as a member of the limited liability company that owned and operated the business, Harte LLC. Under Corporations Code section 17703.04, subdivision (a)[13] (formerly section 17101, subdivision (a)), a member of a limited liability company has no personal liability for the debts, obligations, or other liabilities of the company. Thus, as we stated in our prior opinion, "[Supancic and Getzels] [do] not and cannot articulate a viable theory of vicarious liability, such as agency, against [Turner], who has an ownership interest in [a] limited liability company that runs the White Harte [Pub]." In other words, any reasonable attorney would agree that Supancic and Getzels's agency theory of liability against Turner was completely without merit.

Although the trial court recognized that the claims against Turner in the original complaint were untenable under the partnership/agency theory actually pleaded, it nevertheless concluded that "[d]efendants had probable cause to pursue and

---

November 15, 2012, and the first amended complaint was not filed until November 26, 2014.

[13] Section 17703.04, subdivision (a) provides: "All of the following apply to debts, obligations, or other liabilities of a limited liability company, whether arising in contract, tort, or otherwise: [¶] (1) They are solely the debts, obligations, or other liabilities of the limited liability company to which the debts, obligations, or other liabilities relate. [¶] (2) They do not become the debts, obligations, or other liabilities of a member or manager solely by reason of the member acting as a member or manager acting as a manager for the limited liability company."

maintain them based on [Turner's] status as an owner and landlord of the real property that Harte LLC leased for its White Harte [Pub] business." In reaching its conclusion, the trial court apparently assumed that, as long as a reasonable lawyer with knowledge of the facts *could have* asserted a tenable claim based on a different legal theory, Turner could not show a lack of probable cause to pursue the claims actually pleaded. But we must conduct the probable cause analysis based on the claims the attorney pleaded and pursued, not the theories and claims that, in hindsight, he or she *could have* pursued. (*Sangster v. Paetkau*, *supra*, 68 Cal.App.4th at pp. 164; *Jay v. Mahaffey*, *supra*, 218 Cal.App.4th at p. 1542.) Here, Supancic and Getzels, although they named numerous Doe defendants in their original complaint, did not assert a theory of liability based on Turner's status as a landlord. The fact that defendants later discovered that Turner was a landlord, in the absence of any asserted theory of liability based on that status, does not, in our view, support a finding of probable cause.

The trial court therefore erred when it concluded that Getzels had probable cause to pursue the partner/agency theory of liability against Turner for two years before amending to include the owner/lessor theory. Moreover, because the first amended complaint continued to assert an agency theory of liability, in addition to the owner/lessor theory, Getzels had no probable cause to assert the ten causes of action in that complaint based on that agency theory. Thus, regardless of the amendment, it was error for the trial court to conclude that defendants had probable cause from and after the amendment because the flawed agency theory against Turner remained in the complaint through and including the underlying judgment.

(*Kreeger v. Wanland*, *supra*, 141 Cal.App.4th at p. 832 [action for malicious prosecution will lie if any one of the theories of liability alleged in the complaint was asserted without probable cause].)

2. Owner/Lessor Liability

a. ADA and Related State Law Discrimination Claims[14]

Moreover, even if we were to ignore that the original complaint did not allege a theory of owner/lessor liability and consider only whether the November 26, 2014, first amended complaint was supported by probable cause, we would still reverse. The trial court cited to 28 Code of Federal Regulations [part] 36.201, which provides that landlords can be liable for discrimination on the basis of disability. But as we discussed in our prior opinion, the ADA regulations do not support a finding of probable cause because defendants "did not plead or provide any proof that [Turner] violated [his duty as a landlord under the ADA] and discriminated against [Supancic], and instead predicated [their] theory of direct liability on the alleged fact of the violation and [Turner's] mere ownership of the real property where the alleged violation occurred." (*Supancic v. Turner*, *supra*, B263896, at p. 12-13.) This theory of direct liability did not survive summary judgment, as we previously concluded.

---

[14] In addition to the fourth and tenth causes of action for violation of the ADA based on disability/service dog discrimination, Supancic's first, second, third, and, in part, ninth causes of action asserted derivative state law claims based on disability/service dog discrimination.

Defendants counter that the owner/lessor theory of direct liability pleaded was supported by probable cause because, among other things, "Getzels had properly obtained similar liability payments from landlords under this same theory of liability." Although Getzels's ability to obtain payments from other landlords may be relevant to the separate element of malice, it is irrelevant to our analysis of probable cause. The first amended complaint alleged that Turner was liable based solely on his status as owner/lessor of the property, and not on any allegations or facts showing that Turner promoted, acquiesced in or otherwise was aware of, policies or procedures of the White Harte Pub business that discriminated against disabled persons with service dogs. As the trial court in the underlying action found, no such policies or procedures were ever pleaded or proved in support of that action. And, as we concluded in our opinion affirming the trial court's grant of summary judgment, absent allegations or proof of such discriminatory policies or procedures, Turner had no duty to Supancic under the ADA or 28 Code of Federal Regulations part 36.201 based solely on his status as owner/lessor of the property. (See 28 C.F.R. § 36.302(c)(1); *Haynes v. Wilder Corp. of Delaware* (M.D. Fla. 2010) 721 F.Supp.2d 1218, 1228.)

Defendants' citation to *Botosan v. Fitzhugh* (S.D. Cal. 1998) 13 F.Supp.2d 1047 is inapposite. While that case supports the proposition that "[u]nder the ADA, liability attaches to landlords and tenants alike" (*id.* at p. 1053), it does not support the separate proposition that a defendant can be held liable for discriminatory acts by a tenant, based solely on his status as a landlord. Defendants cite no case in support of this proposition and we have found none. Accordingly, their belated alternative

theory of owner/lessor liability was not legally tenable under the facts pled or those adduced at trial, and therefore could not support probable cause to continue to pursue the action against Turner from and after the filing of the amended complaint.

b. Intentional Infliction and Assault Claims

The trial court acknowledged that defendants did not have probable cause to pursue the intentional infliction of emotional distress and assault claims on the flawed partnership/agency theory. Nevertheless, the court ruled that, under the undisputed facts concerning Turner's ownership of the property, a reasonable attorney in Getzels's position *could have* pursued a tenable claim for common law tort liability based on Restatement Second of Torts (Restatement), section 344. According to the trial court, because Turner admitted in a separate action against Moeini that he knew Moeini had a propensity for violent and assaultive behavior, he had a common law duty as owner of the property on which White Harte Pub conducted business to take reasonable steps to prevent Moeini from intimidating and assaulting customers such as Supancic.

The problem with defendants' Restatement theory is that it was never raised in the underlying action, much less specifically pleaded. Indeed, it appears from the record that Turner's alleged knowledge of Moeini's propensity for violence, as evidenced by his cross-complaint in the separate action against Moeini, was never mentioned in any of the filings or arguments in that prior action. Instead, defendant raised Turner's alleged knowledge for the first time in defense of the malicious prosecution action.

As explained above, we must consider the theories actually asserted in the underlying action (*Sangster v. Paetkau*, *supra*, 68 Cal.App.4th at pp. 164; *Jay v. Mahaffey*, *supra*, 218 Cal.App.4th at p. 1542), not theories conjured after the termination of that action. The trial court therefore erred in concluding that defendants had probable cause to pursue the intentional infliction and assault claims based on the Restatement theory of landowner liability.

c. Sexual Orientation Discrimination Claims

In addition to the ADA discrimination claims and the two intentional tort claims, the original and amended pleadings asserted claims against Turner for sexual orientation discrimination.[15] Because there were no allegations or facts adduced at trial that Turner actively engaged in the alleged discrimination and intimidating conduct, the only theory of liability that supported the assertion of those claims against Turner was the flawed partnership/agency theory. Defendants did not contend in either the underlying action or the malicious

---

[15] The seventh, eighth, and, in part, the ninth causes of action were based on sexual orientation discrimination under the Unruh Civil Rights Act (Civ. Code, § 51 et seq.) and the Tom Bane Civil Rights Act (Civ. Code, § 52.1; *D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836, 858 ["'The legislative history [of the Tom Bane Civil Rights Act] reveals that the broad and plain language of [Civil Code] sections 51.7 and 52.1 was chosen to provide protection from discriminatory violence and intimidation, and from threats, intimidation and coercion that denied the civil rights of others. The creation of civil causes of action by victims of such conduct was at the heart of the legislation'"]).

prosecution action that the statutory liability as landowner under the ADA or common law liability as landowner under the Restatement supported those claims, nor could they. The owner/lessor liability theory under the ADA was based on disability/service dog discrimination, not sexual orientation discrimination. And, the common law theory of landowner liability was asserted in the malicious prosecution action only in support of the intentional tort claims, not the sexual orientation discrimination claims. As explained above, that common law theory was never pleaded or proved in the underlying action in any event.

Because the trial court's statement of decision did not expressly address the issue of probable cause as it related to the sexual orientation discrimination claims, and because there was no probable cause to assert those claims under the partnership/agency theory pleaded, it was error for the trial court to enter judgment against Turner on those claims.

3. Favorable Termination[16]

As set forth above, the trial court's statement of decision went beyond the probable cause issue under consideration in Phase I of the trial and addressed the separate element of favorable termination, stating "the [c]ourt cannot conclude that any decision on the merits [of the fifth or sixth causes of action] was made [by the trial court]." Because the trial court discussed the favorable termination element as it related to the intentional infliction of emotional distress and assault claims, the parties briefed the issue on appeal.

Based on the parties' stipulations concerning the scope of the issues and the evidence to be considered in Phase I of the trial on the probable cause element and the trial court's ensuing statement of decision and judgment, we conclude that the issue concerning the favorable termination element is not properly before us. Notwithstanding the brief discussion of the favorable termination issue in the statement of decision, the statement

---

16 "'The first element of a malicious prosecution cause of action is that the underlying case must have been terminated in favor of the malicious prosecution plaintiff. The basis of the favorable termination element is that the resolution of the underlying case must have tended to indicate the malicious prosecution plaintiff's innocence. [Citations.] When prior proceedings are terminated by means other than a trial, the termination must reflect on the merits of the case and the malicious prosecution plaintiff's innocence of the misconduct alleged in the underlying lawsuit.' [Citation.] If the evidence of the circumstances of the termination is conflicted, '"the determination of the reasons underlying the dismissal is a *question of fact*."'" (*Daniels v. Robins* (2010) 182 Cal.App.4th 204, 217, italics added.)

itself is entitled "Trial: Phase [I]—Probable Cause." Moreover, the majority of the statement is devoted to the issue of probable cause and the trial court's reasoning for concluding that Turner failed to show a lack of probable cause on defendants' part for asserting each of the ten claims against him. And, immediately following the brief discussion of the favorable termination element, the statement concludes as follows: "As the [c]ourt [concludes] that [Turner] failed to establish the lack of probable cause on Defendant's part to pursue and maintain the underlying action, there is no need for trial on the other prongs of a malicious prosecution action, *i.e.*, *favorable termination* and malice." (Italics added.) Finally, the judgment, which incorporated the statement of decision, states only that "[Turner] has failed to establish the lack of probable cause on defendants' part in pursuing and maintaining the underlying action. . . ."

Based on our reading of the statement of decision and the judgment based thereon, it is evident that the favorable termination element was not the basis for the trial court's decision on the merits of the malicious prosecution action or the judgment from which Turner appeals. We therefore do not address the parties' contentions based on that issue. Nor do we express an opinion on the merits of any of the other elements of Turner's malicious prosecution claim.[17]

---

[17] We note for purposes of remand that our record does not reflect that the fifth and sixth causes of action were dismissed or explicitly abandoned and we therefore assume that they remained in the complaint after the November 26, 2014, amendment. Following Turner's second motion for summary judgment, the trial court entered judgment in Turner's favor *on the amended complaint–not just certain parts of it*–and Supancic

IV. DISPOSITION

The judgment is reversed and remanded. The trial court is directed to vacate the judgment against Turner and enter an order concluding that the underlying action was not supported by probable cause. Turner is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

RUBIN, P. J.

MOOR, J.

---

thereafter did not assert on appeal that the judgment was erroneously entered on the non-ADA claims for relief, including the fifth and sixth causes of action.